

# The Executive Order

---

On February 28, 2017, the President signed the “Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.”

The E.O. calls on the EPA Administrator and the Assistant Secretary of the Army for Civil Works to review the final Clean Water Rule and “publish for notice and comment a proposed rule rescinding or revising the rule....”

The E.O. directs that EPA and the Army “shall consider interpreting the term ‘navigable waters’” in a manner “consistent with Justice Scalia’s opinion” in *Rapanos*. Justice Scalia’s opinion indicates CWA jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

<https://www.whitehouse.gov/the-press-office/2017/02/28/presidential-executive-order-restoring-rule-law-federalism-and-economic>

# Two-Step Process

---

The agencies are implementing the Executive Order in two steps to provide as much certainty as possible as quickly as possible to the regulated community and the public during the development of the ultimate replacement rule.

1. The agencies are taking action to establish the legal status quo in the Code of Federal Regulations, by recodifying the regulation that was in place prior to issuance of the Clean Water Rule and that is being implemented now under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule.
2. The agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that reflects the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

The agencies are aware that the scope of CWA jurisdiction is of intense interest to many stakeholders and therefore want to provide time for appropriate consultation and deliberations on the ultimate regulation.

In the meantime, the agencies will continue to implement regulatory definition in place prior to the 2015 rule, consistent with the 2003 and 2008 guidances, in light of the *SWANCC* and *Rapanos* decisions, pursuant to the Sixth Circuit stay of the Clean Water Rule.

# Step 1: Withdraw 2015 Clean Water Rule

---

While the Sixth Circuit stay may remain in effect for some time, its duration is uncertain.

To provide greater certainty, the agencies will move to reinstate the preexisting regulations and guidance and to withdraw the 2015 Rule.

In the Step 1 proposed rule, the agencies will define “waters of the United States” using the regulatory definition in place before the Clean Water Rule, which the agencies will continue to implement according to longstanding practice, just as they are today.

The Step 1 proposed rule would maintain the approach in place for decades until a revised rule with a new definition can be promulgated.

# Step 2: Develop New Rule Consistent with the Executive Order

---

The E.O. directs the agencies to consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Scalia’s opinion indicates Clean Water Act jurisdiction includes relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The agencies are consulting with state and local government officials as we begin to develop the new definition.



# Potential Approaches to “Relatively Permanent” Waters

---

Perennial plus  
streams with  
“seasonal” flow

Current practice:  
seasonal flow =  
about 3 months  
(varies  
regionally)

Perennial plus  
streams with another  
measure of flow

Use appropriate,  
implementable  
metrics, e.g.,  
frequency of flow,  
intersecting water  
table

Perennial streams  
only

Streams  
that carry flow  
throughout the  
year except in  
extreme drought

Other

Thoughts?

# Potential Approaches to Wetlands with a “Continuous Surface Connection”

---

Surface connection  
even through non-  
jurisdictional feature

Current practice  
considers directly  
abutting wetlands  
and those with a  
continuous surface  
connection,  
regardless of  
distance, to be  
jurisdictional

Some degree of  
connectivity

Use appropriate,  
implementable  
metrics, e.g.,  
distance

Wetland must  
directly touch  
jurisdictional waters

Only wetlands that  
directly touch a  
jurisdictional water

Other

Thoughts?

# Discussion:

---

The change in jurisdictional waters will vary across states and localities and with the options suggested above. Given that:

1. How would you like to see the concepts of “relatively permanent” and “continuous surface connection” defined and implemented? How would you like to see the agencies interpret “consistent with” Scalia? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?
2. What opportunities and challenges exist for your state or locality with taking a Scalia approach?
3. Do you anticipate any changes to the scope of your state or local programs (e.g., regulations, statutes or emergency response scope) regarding CWA jurisdiction? In addition, how would a Scalia approach potentially affect the implementation of state programs under the CWA (e.g., 303, 311, 401, 402 and 404)? If so, what types of actions do you anticipate would be needed?
4. The agencies’ economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your region, state or locality that could be affected but would not be captured in such an economic analysis?